IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-881

RICHARD HOOBAN, APPELLANT PRO SE

v.

BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, RESPONDENT

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

RICHARD HOOBAN
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BOTHELL, WASHINGTON
98011
206-827-2188

APPELLANT PRO SE

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

This appeal involves the deprivation of appellant's due process rights by the State of Washington in its use of arbitrary and capricious bar examination methods. The opinion of the trial court is unreported and not reprinted herein as the action was dismissed before trial. The opinion of the Supreme Court of the State of Washington is reprinted as Appendix C.

JURISDICTION

1. This appeal is taken from a deci-

sion of the Supreme Court of the State of Washington handed down on September 5, 1975. Your appellant is questioning the constitutionality of the State of Washington's bar examination and was an examinee in February of 1974. The arbitrary and manifestly unfair testing methods are attacked as violative of the Fourteenth Amendment of the Constitution of the United States.

2. Jurisdiction for this appeal is granted by 28 U.S.C. 1257(2). Notice of Appeal was filed in the Supreme Court of the State of Washington on October 27, 1974.

3. The following cases sustain the jurisdiction of this Court on direct appeal: Brown v. Board of Education, 347 U.S. 483 (1954); Konigsberg v. State Bar of California, 353 U.S. 252 (1956); Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1956); Baird vs. State Bar of Arizona, 401 U.S. 1 (1970).

QUESTIONS PRESENTED

1. The use of a multiple choice bar examination with more than one correct answer for each question encourages guessing and bears no rational connection to the examinee's ability to practice law.

2. The essay portion of the Washington State Bar is administered in a manner which is manifestly unfair.

3. RCW 2.48.060 is unconstitutionally vague and allows the bar examination system to operate in a manner which denies an examinee his due process rights.

4. By requiring applicants who have failed the bar exam to wait six (6) months before allowing retesting, the Washington State Bar Association has imposed a de facto residence requirement which denies the right to travel.

5. Appellant's due process rights were denied by the trial court's refusal to allow discovery of the multi-state multiple choice examination materials.

6. The law was misconstrued by the court below.

STATEMENT OF THE CASE

This case was filed in the Supreme Court in and for King County, Washington in mid-1974. Your appellant, a Vietnam veteran, who is descended from a Revolutionary War veteran and from a Chief of the Bannock Indian tribe, brought this action seeking a writ of mandamus compelling the issuance of a license for the practice of law. Motion for summary judgment was granted for the respondent, and an appeal was taken to the Supreme Court of the State of Washington. The trial court's decision was upheld by an opinion issued September 4, 1975.

The constitutionality of the statute governing bar examinations in the State of Washington, RCW 2.48.060 was raised below, and the lower court's ruling effectively upheld the constitutionality of that statute. Appendix C.

Appellant contends that bar examinations, and specifically the Washington

bar exam as administered, are unconstitutional as their results have no rational connection to the examinee's ability to practice law. Shapiro v. Thompson, 394 U.S. 618 (1969); Griggs v. Duke Power Co., 401 U.S. 424 (1971). The bar examination given by the State of Washington included two days of essay questions, the examinee being required to answer 18 out of 24 questions. The third day of examination uses the "multi-state" multiple choice type test. More than one correct answer is presented for each multiple choice question, with the choice of the "best" answer left to the examinee's discretion as influenced by his own value judgments, socio-ethnic considerations, and his luck.

The practice of law is often an imprecise science. Whereas there may be two correct solutions to a client's problems, with one being best for him, the other solution may be best for another client with the same problem.

An examination which allows a choice between two or more correct answers is manifestly unfair because the examinee must guess which type of client the exam writer had in mind and rely in great part upon luck. Because the multi-state exam encourages guessing, it has no value in predicting the examinee's ability to practice law.

The grading system used by the Washington State Bar is manifestly unfair because of the great degree of discretion allowed the graders. Your appellant scored 129, which was scaled to 133, on the multi-state portion of the exam. A score of 126 out of 200 possible points

is a passing score. On the essay portion of the exam, your appellant scored 122 with 126 out of 180 possible points being a passing score.

Upon review of appellant's exam by the Washington State Bar, scores on 8 of the ten-point questions varied from the original grades by 1 to 2 points. It is, therefore, clear that subjective differences among graders can deny an examinee the right to practice law. Because the grading system and the statute authorizing the Bar such discretion in its use is not designed to insure absolute consistency in grading results, that system is manifestly unfair. A manifestly unfair and arbitrary bar examination denies the examinee his due process rights.

Further, the bar examination is offered only two times each year, which denies the examinee who fails his basic right to travel. The examinee who fails must maintain residence in the State of Washington while awaiting the next examination, which imposes a residence requirement which bears no rational connection to the practice of law and which protects no demonstrated interest of the State of Washington.

Your appellant was denied discovery of the multi-state bar examination by the trial to his extreme prejudice. It is contended that this denial violated appellant's due process rights.

THE QUESTIONS ARE SUBSTANTIAL

A. THE USE OF A MULTIPLE CHOICE BAR EXAMINATION WITH MORE

THAN ONE CORRECT ANSWER FOR EACH QUESTION ENCOURAGES GUESSING AND BEARS NO RATIONAL CONNECTION TO THE EXAMINEE'S ABILITY TO PRACTICE LAW.

If the denial of the right to practice law is based upon fraud, coercion, arbitrariness or manifest unfairness, that denial violates that applicant's due process rights. Schware v. Board of Examiners of New Mexico, 353 U.S. 232 (1957). It is your appellant's contention that a multiple choice examination which has more than one correct answer to each question is manifestly unfair. Encouraging guessing between correct answers to find the one which the exam writer considered "best" has no connection to the examinee's ability to practice law. Social factors, economic factors, and subjective value judgments are going to create a variance between legal scholars in choosing a "best" answer from several correct answers. Subject value judgments have no place in an objective form of examination and create a patent unfairness.

B. THE ESSAY PORTION OF THE WASHINGTON STATE BAR IS ADMINISTERED IN A MANNER WHICH IS MANIFESTLY UNFAIR.

When your appellant received a review of his essay answers on the Washington bar examination, the answers to 8 questions were graded 1 to 2 points differently from their original grade. Two points on a ten-point question is a significant variance, especially when considered in light of the fact that 5 or 6 points are the lowest scores given. Appendix C.

The two-point variance, therefore, reflects a 40% to 50% change in the 4 to 5 point range of scores received. Clearly, the essay grading method used allows too much discretion to the grading attorney. Model answers provided to the grader should allow no variance between different graders. The unfairness of the grading system is manifest.

C. RCW 2.48.060 IS UNCONSTITUTIONALLY VAGUE AND ALLOWS THE BAR EXAMINATION SYSTEM TO OPERATE IN A MANNER WHICH DENIES AN EXAMINEE HIS DUE PROCESS RIGHTS.

Because RCW 2.48.060 allows the Washington State Bar to administer the bar examination as is herein outlined, it is unconstitutionally vague. This statute contains no safeguards or standards which the Bar must follow in administering the bar examination. This situation has not been corrected by regulation, so the statute must be held void.

D. BY REQUIRING APPLICANTS WHO HAVE FAILED THE BAR EXAM TO WAIT SIX MONTHS BEFORE ALLOWING RE-TESTING, THE WASHINGTON STATE BAR ASSOCIATION HAS IMPOSED A DE FACTO RESIDENCE REQUIREMENT WHICH DENIES THE RIGHT TO TRAVEL.

The 6-month waiting requirement before re-testing forces prospective attorneys to maintain their Washington residency. No rational connection can be demonstrated between this de facto residence

requirement and the ability to practice law. Your appellant has been damaged by this unnecessary practice. Shapiro v. Thompson 394 U.S. 618 (1969).

E. APPELLANT'S DUE PROCESS RIGHTS WERE DENIED BY THE TRIAL COURT'S REFUSAL TO ALLOW DISCOVERY OF THE MULTI-STATE MULTIPLE CHOICE EXAMINATION MATERIALS.

As the Supreme Court of the State of Washington noted in a footnote, appellant was severely prejudiced by the limitations placed upon his discovery. This matter was not specifically alleged as error below, but the vested interest of the Supreme Court of the State of Washington should have required their consideration of the problem. That Court is the prime overseer of the Bar Association and attorneys are officers of that Court.

Disallowing discovery is certainly a shocking denial of appellant's due process rights and is a matter the Court should have decided at its own instance. That Court is the guardian of the bar examination system in the State of Washington, and failure to reverse on the grounds of lack of discovery constitutes reversible error.

F. THE LAW WAS MISCONSTRUED BY THE COURT BELOW.

It is respectfully asserted that the Court below erred in holding that appellant's proffered caselaw did not apply.

As noted in D above, there is a right to travel problem involved herein.

Further, Griggs v. Duke Power Co., 401 U.S. 424 (1971) is applicable in that it requires employment related tests, and the bar exam is such a test, to be limited to testing job related skills. Appellant's contention is that this appeal is analogous to Griggs. Bar examinations should be limited to testing an examinee's ability to practice law and should not be designed to measure ability to take examinations.

CONCLUSION

The Washington State Bar examination system is manifestly unfair in its application. A man's ability to practice law cannot be determined in a three-day marathon of testing. However, the system exists in every state and fairness in the use of exam results must be demanded.

It is respectfully submitted that the lower court erred in its review of this matter. In light of the points and authorities herein, this Court is urged to give appellant an opportunity to present briefs and oral argument.

The issues presented in this appeal will come before the Court someday and appellant respectfully asks that it also be his day in court.

Respectfully submitted,

Richard Hooban

RICHARD HOOBAN
APPELLANT PRO SE
14216 75th N.E.
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AMENDMENT XIV (1868) OF THE U.S. CONSTITUTION

SECTION ONE. ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

APPENDIX A

CHAPTER 94.

[H. B. 239.]

CREATING WASHINGTON STATE BAR ASSOCIATION.

AN ACT to create an association to be known as the "Washington State Bar Association;" to provide for its organization, government, membership and powers; to regulate the practice of law and to provide penalties for the violation of said act and repealing all acts or parts of acts in conflict therewith.

Be it enacted by the Legislature of the State of Washington:

Title.

SECTION 1. *Title of Act.* This act may be known and cited as the state bar act.

Washington State Bar Association.

SEC. 2. *Objects and Powers.* There is hereby created as an agency of the state, for the purpose and with the powers hereinafter set forth, an association to be known as the Washington State Bar Association, hereinafter designated as the state bar,

which association shall have a common seal and may sue and be sued, and which may, for the purpose of carrying into effect and promoting the objects of said association, enter into contracts and acquire, hold, encumber and dispose of such real and personal property as is necessary thereto.

Purpose.

Members.

SEC. 3. *First Members.* The first members of the Washington State Bar Association shall be all persons now entitled to practice law in this state.

New members.

SEC. 4. *New Members.* After the organization of the state bar, as herein provided, all persons who are admitted to practice in accordance with the provisions of this act, except judges of courts of record, shall become by that fact active members of the state bar.

APPENDIX B

Board of Governors.

SEC. 5. *Board of Governors.* There is hereby constituted a board of governors of the state bar, which shall consist of the president of the state bar, as an ex-officio member, and of one member elected by secret ballot by mail by the active members residing in each congressional district now or hereafter existing in the state. The members of the board of governors shall hold office for three (3) years and until their successors are elected and qualified: *Provided, however,* That the members of the board of governors elected to constitute the first board shall, at their first meeting so classify themselves by lot that two members thereof shall hold office for one year only and two others for two years only and until their successors are elected and qualified. Vacancies in said board of governors shall be filled by the continuing members of the board until the next district election, held in accordance with the rules hereinafter provided for.

Elected.

Classification of.

To govern.

SEC. 6. *State Bar Governed by Board of Governors.* The state bar shall be governed by the board of governors which shall be charged with the

executive functions of the state bar and the enforcement of the provisions of this act and all rules adopted in pursuance thereof. The members of the board of governors shall receive no salary by virtue of their office.

Powers of.

SEC. 7. *Powers of Governors.* The said board of governors shall have power, in its discretion, from time to time to adopt rules

(a) Concerning membership and the classification thereof into active, inactive and honorary members; and

(b) Concerning the enrollment and privileges of membership; and

(c) Defining the other officers of the state bar, the time, place and method of their selection, and their respective powers, duties, terms of office and compensation; and

(d) Concerning annual and special meetings; and

(e) Concerning the collection, the deposit and the disbursement of the membership and admission fees, penalties, and all other funds; and

(f) Providing for the organization and government of district and/or other local subdivisions of the state bar; and

(g) Providing for all other matters, whether similar to the foregoing or not, affecting in any way whatsoever, the organization and functioning of the state bar. Any such rule may be modified, or rescinded, or a new rule adopted, by a vote of the active members under rules to be prescribed by the board of governors.

Admission to practice law.

SEC. 8. *Admission and Disbarment.* The said board of governors shall likewise have power, in its discretion, from time to time to adopt rules, subject to the approval of the supreme court, fixing the qualifications, requirements and procedure for admission to the practice of law; and, with such

approval, to establish from time to time and enforce rules of professional conduct for all members of the state bar, and, with such approval, to appoint boards or committees to examine applicants for admission; and, to investigate, prosecute and hear all causes involving discipline, disbarment, suspension or reinstatement, and make recommendations thereon to the supreme court; and, with such approval, to prescribe rules establishing the pro-

Disbarment

cedure for the investigation and hearing of such matters, and establishing county or district agencies to assist therein to the extent provided by such rules: *Provided, however,* That no person who shall have participated in the investigation or prosecution of any such cause shall sit as a member of any board or committee hearing the same.

Partial invalidity.

SEC. 17. *Legislative Intent.* If any section, subsection, sentence, clause or phrase of this act or of any rule adopted hereunder, is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act nor of any other rule adopted hereunder. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Passed the House February 13, 1933.
Passed the Senate March 1, 1933.
Approved by the Governor March 13, 1933.

APPENDIX B

APPENDIX C

Richard HOOBAN, Appellant,
v.
BOARD OF GOVERNORS OF the WASHINGTON STATE BAR ASSOCIATION, Respondent.
No. 43548.

Supreme Court of Washington, En Banc.
Sept. 4, 1975.

Proceeding was filed for writ of mandamus directing Board of Governors of State Bar Association to refer petitioner to the Supreme Court as entitled to practice law The Supreme Court, King County, Erle W. Horswill, J., granted summary judgment in favor of the Board and petitioner appealed. The Supreme Court, Finley, J., held that speculative and unsupported allegations that (1) bar examiner lacked sufficient standards by which to judge scores, (2) essay examinations were not "perfect" because the grading thereof was subjective and may have varied from one grader to another, (3) the multiple choice portion of the examination encouraged guessing which could be of no value in terms of predicting proficiency in the law, and (4) examiners had a vested interest in maintaining a low pass rate were not sufficient to establish arbitrariness or unfairness as grounds for invalidating the bar exam.

Affirmed.

1. Attorney and Client ⇐6

The general rule is that courts will not set aside the determinations of bar examiners as to an applicant's legal proficiency unless there is a showing of fraud, coercion, arbitrariness or manifest unfairness.

2. Constitutional Law ⇐287

If the denial of the right to practice law is based upon fraud, coercion, arbitrariness or manifest unfairness, basis for finding the applicant lacking in proficiency

would be highly dubious and such could constitute a denial of due process.

Attorney and Client ⇐6

A simple allegation, with nothing more, that bar examiners have a vested interest in maintaining a low pass rate is insufficient to establish arbitrariness in the conduct of bar examination.

4. Attorney and Client ⇐6

Speculative and unsupported allegations that (1) bar examiners lacked sufficient standards by which to judge scores, (2) essay examinations were not "perfect" because the grading thereof was subjective and may have varied from one grader to another, (3) the multiple choice portion of the examination encouraged guessing which could be of no value in terms of predicting proficiency in the law, and (4) examiners had a vested interest in maintaining a low pass rate were not sufficient to establish arbitrariness or unfairness as grounds for invalidating the bar exam.

Richard Hooban, pro se.

Washington State Bar Ass'n, Douglas C. Baldwin, Seattle, for respondent.

FINLEY, Associate Justice.

This case involves a challenge to the Washington State Bar Examination conducted in February, 1974. Appellant sought a writ of mandamus directing the Board of Governors of the Washington State Bar Association to refer Appellant to this court as entitled to practice law. The superior court *granted summary* judgment in favor of the Board of Governors. We affirm.

Appellant qualified for and took the February, 1974, bar examination which was composed of two parts: (1) a two-day essay examination; and (2) a one-day multi-state multiple choice examination.

The essay portion of the exam consisted of twenty-four questions of which an applicant was required to answer eighteen. These questions were graded on a scale of zero to ten points per question. To pass the essay portion of the examination, a score of 126 out of 180 points was required. Appellant scored 122.

The multiple choice portion of the examination consisted of 200 questions prepared by the Educational Testing Service of Princeton, New Jersey, in coordination with the National Conference of Bar Examiners. This portion of the bar examination is graded on a scale from zero to 200 points. The multiple choice score received is then combined by a formula with the essay grade in such a manner that the multiple choice score constitutes one-third of the total examination score. Appellant failed the multiple choice portion of the exam in addition to failing the essay portion. As such, his combined essay and multiple choice score was obviously below passing.

Appellant subsequently requested that his examination be regraded. A Review Committee, composed of three members of the Committee of Bar Examiners who had not participated in the February, 1974, bar examination, was appointed to regrade Appellant's examination. The multi-state portion of the examination, however, apparently was not reviewed and Appellant has not convinced us that it should have been reviewed. The essay portion of the examination was reviewed after the previous grades had first been obliterated and could not be known by the Review Committee. The total points given by the Review Committee were 121 as compared to the 122 points Appellant had initially received. The Review Committee recommended to the Board of Governors not to change Appellant's score; this recommendation was adopted.

Appellant then instituted the instant suit. The summary judgment subsequently entered in favor of the bar association primarily was on the basis of two affidavits —one submitted by the chairman of the Committee of Law Examiners and the other submitted by the chairman of the Review Committee.

Appellant's contentions relate generally to the constitutionality of bar examinations and to an alleged arbitrariness in the grading of his particular examination.

With respect to the constitutional challenge, Appellant's theory is quite ambiguous. He relies primarily upon three cases: *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969), and *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

However, all of these cases are plainly inapposite to the facts of this case. *Shapiro v. Thompson, supra*, holds that the right to travel is a fundamental right and there is no compelling state interest to justify penalizing the exercise of that right by imposing a 1-year residency requirement as a prerequisite to welfare benefits. No such residency requirements are necessary to take the Washington bar examination and no other factor has been alluded to which would impermissibly impinge upon the right to travel. *In re Griffiths* is similarly inapplicable as it holds only that a state may not automatically exclude all aliens from the practice of law irrespective of their proficiency. Finally, *Griggs v. Duke Power Co., supra*, is not relevant since it involved impermissible racial discrimination in employment tests violative of the Civil Rights Act, 42 U.S.C.A. § 2000e–2 (1964). Herein, there has not even been an allegation of racial discrimination in the conduct or operative effect of the Washington bar examination nor is there anything in the record supportive of such a possibility. In short, the cases simply do not support Appellant's thesis that the bar examination was unconstitutional.[1]

[1, 2] The general rule is that courts will not set aside the determination of bar examiners as to an applicant's legal proficiency unless there is a showing of fraud, coercion, arbitrariness or manifest unfairness. *See generally, Petition of Pacheco*, 85 N.M. 600, 514 P.2d 1297 (1973); *Application of Peterson*, 459 P.2d 703 (Alaska 1969); *In re Monaghan*, 126 Vt. 193, 225 A.2d 387 (1967); *Staley v. State Bar of California*, 17 Cal.2d 119, 109 P.2d 667 (1941). Of course, if the denial of the right to practice law were based upon fraud, coercion, arbitrariness or manifest unfairness, then the basis for finding the applicant lacking in proficiency would be highly dubious and this could constitute a denial of Due Process. *Schware v. Board of Bar Examiners of New Mexico*, 353 U. S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (Frankfurter, J., concurring).

In any event, Appellant contends that the Washington bar examination was arbitrary and capricious. This argument apparently is composed of four contentions: (1) bar examiners lack sufficient standards by which to judge scores (Appellant urges that scores should somehow be correlated to law school grades); (2) essay examinations are not "perfect" because the grading thereof is subjective and may vary from one grader to another; (3) the multiple choice portion of the examination encourages guessing which can be of no value in terms of predicting proficiency in the law;

1. A stronger constitutional argument is one that Appellant has not made. Appellant was allowed discovery of (1) all information in his bar examination file; (2) all instructions given to the Review Committee before its re-examination of Appellant's examination; (3) the names and addresses of the members of the Review Committee; and (4) the scores and results of the re-examination conducted by the Review Committee. But apparently pursuant to RCW 42.17.310(1)(f), Appellant was denied access to (1) the instructions given to the original graders; (2) model answers to the essay questions; and (3) sample answers and scores of other applicants who passed the examination. It could be argued that, as a matter of procedural Due Process, Appellant is constitutionally entitled to the materials that were denied. *See Application of Peterson*, 459 P.2d 703 (Alaska 1969). *But see Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974). However, since Appellant has not made the argument, we will not consider it herein and the matter remains an open question.

and (4) examiners have a vested interest in maintaining a low pass rate.

[3] We are not persuaded by these speculative and unsupported allegations. A simple *allegation*, with nothing more, that the examiners have a vested interest in maintaining a low pass rate is insufficient to establish arbitrariness in the conduct of the examination. And there is nothing in the record indicative of fraud or dishonesty by the examiners for the purpose of restricting the pass rate. There is likewise nothing in the record to indicate any possible arbitrariness in the multiple choice questions.

Regarding the essay questions, we recognize that they carry with them some degree of subjectivity in their grading, but such exams have continuously been upheld by the courts. *Feldman v. State Board of Law Examiners*, 438 F.2d 699 (8th Cir. 1971); *Chaney v. State Bar of California*, 386 F.2d 962 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968); *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974).

[4] Circumstances could arise where the formulation or choice of essay questions or the method of grading them could be arbitrary and capricious. But, again, there is no evidence in the record herein indicative of arbitrary or capricious action. To the contrary, the affidavits submitted by the Washington State Bar Association, which are uncontroverted, establish the overall fairness of the bar examination process and the safeguards employed to guard against human error or arbitrary or capricious action. These affidavits establish that examiners are assigned the task of formulating questions in various fields of the law. Approximately two months before the examination, the examiners submit their proposed questions and answers covering the legal issues to a screening committee. The screening committee analyzes the questions and answers, examines them for clarity and then returns them to the examiners for revision. The revised proposed questions are subsequently presented to a meeting of the full panel of the examiners where the questions and answers are again analyzed. If necessary, further revisions are then made.

In the grading of the answers, the examiners are encouraged not to assign extremely low grades to any failing paper. As a result it is extremely rare for an applicant to receive failing grades below five or six points; a passing grade is seven points. It is also the practice of the bar examiners to meet and review borderline failures after all grades have been tabulated. Where, in the judgment of the examiners, increases in the essay grades are merited, an applicant may be passed. In Appellant's case, it would have required six additional essay points to bring his combined score to the passing mark. It was concluded that an increase of six points was completely unmerited.

In addition, Appellant was afforded even further review of his examination. At his request, his 18 essay grades were reviewed by a Review Committee, composed of three experienced members of the Committee of Law Examiners who did not participate in the February, 1974, bar examination. Each of the three members of this Review Committee separately graded six answers. After the grading was completed, the grades assigned by the Review Committee were compared with the grades assigned by the original graders. The Review Committee as a whole gave 10 of Appellant's 18 answers the same grade as that given by the original examiners. The grades given to the other 8 answers varied by 1 to 2 points from the grades originally given by the bar examiners. Whenever a member of the Review Committee ascribed a grade to an essay question different from that originally given by the bar examiners, then the other two members of the Review Committee also reviewed the Appellant's answers to those questions. In each instance, this double check resulted in agreement to abide by the grade given by the member of the Review Committee. As

noted earlier, the Review Committee gave Appellant a total of 121 points as compared to the 122 points he had initially received.

We think that these facts, established by the affidavits submitted by the Washington State Bar Association, sufficiently establish the general fairness of the bar examination. Appellant has not presented any facts indicative of arbitrariness. Thus, no genuine issue of fact was shown and the summary judgment was accordingly proper. *W. G. Platts, Inc. v. Platts*, 73 Wash. 2d 434, 438 P.2d 867 (1968).

Respondent has made additional assignments of error, but they are without merit and will not be discussed.

For the foregoing reasons, the judgment of the trial court should be affirmed. It is so ordered.

STAFFORD, C. J., and ROSELLINI, HUNTER, HAMILTON, WRIGHT, UTTER, BRACHTENBACH and HOROWITZ, JJ., concur.

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

RICHARD HOOBAN, APPELLANT
v.
BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, RESPONDENT

No. 43543

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Notice is hereby given that Richard Hooban, the appellant above-named, hereby appeals to the Supreme Court of the United States of America from the final judgment of the Supreme Court of the State of Washington, filed on September 4, 1975 and entered as final on October 6, 1975, affirming the dismissal of the complaint entered in this action on November 27, 1974 as cause No. 784192.

This timely appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated this 24th day of October, 1975.

RICHARD HOOBAN, APPELLANT
14216 75th N.E.
Bothell, Washington 98011
206-827-2188

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

RICHARD HOOBAN, APPELLANT
v.
BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, RESPONDENT

No. 43548

PROOF OF SERVICE

ACKNOWLEDGMENT THAT ALL PARTIES REQUIRED SERVICE HAVE BEEN SERVED

I, Douglas C Bateman, Counsel for the Board of Governors of the Washington State Bar Association, the respondent above-named, hereby acknowledge receipt of three copies of the foregoing Notice of Appeal to the Supreme Court of the United States of America this 24 day of October, 1975.

Douglas C Bateman
Counsel for Board of Governors of the Washington State Bar Association, Respondent

Richard Hooban, Appellant
14216 75th N.E.
Bothell, Washington 98011
206-827-2188

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RICHARD HOOBAN, APPELLANT)
v.) No. 784192
BOARD OF GOVERNORS OF THE WASHINGTON) NOTICE OF APPEAL
STATE BAR ASSOCIATION, RESPONDENT)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Notice is hereby given that Richard Hooban, the appellant above-named, hereby appeals to the Supreme Court of the United States of America from the order dismissing this case entered in this action on November 27, 1974 and affirmed by the Washington State Supreme Court as cause No. 43548 on September 4, 1975, which became final on October 6, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Oct 24,

RICHARD HOOBAN, APPELLANT
14216 75th N.E.
Bothell, Washington 98011
206-827-2188

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

RICHARD HOOBAN, APPELLANT)
v.) No. 784192
BOARD OF GOVERNORS OF THE WASHINGTON) PROOF OF SERVICE
STATE BAR ASSOCIATION, RESPONDENT)

ACKNOWLEDGMENT THAT ALL PARTIES REQUIRED SERVICE HAVE BEEN SERVED

I, Douglas C Baldwin, Counsel for the Board of Governors of the Washington State Bar Association, the respondent above-named, hereby acknowledge receipt of three copies of the foregoing Notice of Appeal to the Supreme Court of the United States of America this 24 day of October, 1975.

Douglas C Baldwin
Counsel for Respondent

Richard Hooban, Appellant
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-881

RICHARD HOOBAN, *Appellant Pro Se,*

v.

BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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The appellee moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument

STATEMENT OF THE CASE

The bulk of appellant's statement is argumentative and appellee feels compelled to supplement appellant's statement of the case.

Appellant duly qualified for, and took the February 1974 bar examination in the State of Washington. The examination consisted of two parts: The first part being a two-day essay examination and the second part being the one-day multi-state bar examination. Appellant failed both portions of the bar examination. Subsequently, appellant requested an impartial regrading of his examination. Pursuant to appellant's request, a review committee composed of three members of the committee of law examiners, who did not participate in the February 1974 examination, were appointed. The review panel concluded that there was no basis for changing the total points given to the appellant for his answers on the essay examination. The multi-state portion of the examination was not reviewed.

The recommendation of the review committee was thereafter considered by the Board of Governors and the Board voted to affirm the opinion of the review committee and disallow any change in appellant's score. Appellant then sought a writ of mandamus directing the Board of Governors of the Washington State Bar Association to refer appellant to the Supreme Court of Washington as entitled to practice law. The Superior Court granted summary judgment in favor of the Board of Governors and the Supreme Court affirmed on the basis that the Bar Association had sufficiently established the general fairness of the bar examination and that appellant had not presented any facts indicative of arbitrariness.

ARGUMENT

The issues in the present case are uniquely narrow, and no amount of strained semantics can convert them into ones warranting review by this Court. The appellant purports to raise five separate questions. Appellee will deal with these five questions as follows:

1. Was the appellant denied any right, privileges, or immunitities secured by the Constitution of the United States without due process? (Questions 3, 4, 5, and 6 of appellant's jurisdictional statement)

2. Do the techniques or procedures used by the appellee in testing the qualification of applicants for admission to the State Bar raise any substantial federal questions? (Questions 1 and 2 of appellant's jurisdictional statement)

I.

Appellant Has Not Been Denied Any Constitutional Rights Cognizable Under the Fourteenth Amendment to the Constitution of the United States

The appellant maintains that the statute which authorizes the Board of Governors of the Bar Association to adopt rules, subject to the approval of the Supreme Court, fixing the qualifications, requirements and procedure for admission to the practice of law is unconstitutionally vague. Beyond that bare ascertion, appellant does not argue further. The Supreme Court concluded that the Washington State Bar Association had established the general fairness of the bar examination and that appellant had not presented any facts indicative of arbitrariness. (*Hooban v. Bd. of Governors*, 85 Wn.2d 774, 780, 539 P.2d 686, 690.) The Court noted numerous safeguards employed by the Bar Association to guard against human error or arbitrary or capricious action. For example: Questions are assigned to the examiners who have been selected to serve on the panel several months in advance of the date of the examination. Ap-

proximately two months before the examination date, the examiners are required to submit their questions and outlines covering legal issues, or proposed answers, to a screening committee, the members of which analyze the questions and answers, examine them for a clarity of expression and adequacy, and return them to the examiners for revision or correction, pursuant to the recommendations of the screening committee. The examiners then bring the revised questions to a meeting of the full panel of the examiners, which goes over each question and subjects it to general discussion and criticism. Out of these questions, further corrections and changes are made, after which the questions go to the printers. Furthermore, uncontroverted affidavits submitted by the Bar Association indicate that it is the practice of the bar examiners participating in an examination to meet to review boarderline failures after all grades have been tabulated, but before the names of the applicants are matched with their examination numbers which have been individually sealed in envelopes. In some instances, where increases in the essay grades are, in the judgment of the examiners, merited, an applicant may be passed. In the case of the appellant, it would have required an increase in one-third of his essay questions to bring his combined score to the passing mark.

This notwithstanding, at the request of the appellant, his grades were reviewed by a review committee composed of three experienced members of the committee of law examiners who did not participate in the February 1974 bar examination. After the appellant's previous scores had been obliterated, this committee made a review of each of the appellant's answers and assigned grades independently. The grades so assigned by the review panel totaled

one point less than the original grades assigned to the appellant's test. The review committee determined that the grade assigned the appellant was fair and that there was no basis for changing it.

Contrary to appellant's allegations that bar examinations are, in general, arbitrary, carpricious, not significantly related to job performance, and that the bar examination system operates in a manner which denies appellant his constitutional rights, the February 1974 bar examination was produced with great care by practicing attorneys for the purpose and with the effect of determining whether the appellant was qualified for the practice of law. It was administered and graded fairly, conscientiously, and impartially.

Appellant's argument that respondent has imposed a de facto residence requirement which denies him his right to travel is fallacious. The Supreme Court said on page 776:

> "No such residency requirements are necessary to take the Washington Bar examination and no other factor has been alluded to which would impermissibly impinge upon the right to travel."

Carried to its logical extreme, appellant's argument would have the Bar Association administer examinations to applicants when it is most convenient to the applicant. In that there are over 1,000 applicants per year, such a requirement would, obviously, be untenable.

Next, appellant argues that his process rights were denied by the trial court's refusal to allow discovery of the multi-state examination materials. The appellant states that the Supreme Court noted in a footnote that appellant was severely prejudiced by the limitations placed upon his

discovery. This statement is misleading when viewed in the context of appellant's argument concerning the denial by the trial court to allow discovery of the multi-state examination materials. The Supreme Court's footnote does not discuss discovery of the multi-state materials but limits its discussion to discovery of some of the essay exam materials. Nor does the Court state that appellant was severly prejudiced by the limitations placed upon his discovery. The Court did say on page 775:

> "The multi-state portion of the examination, however, apparently was not reviewed and appellant has not convinced us that it should have been reviewed."

In fact, the Bar Association is not allowed to retain copies of the multi-state examination under the rules of the National Conference of Bar Examiners. Thus the Bar Association did not have the multi-state materials requested by appellant. Furthermore, we agree with the Court in *Whitfield v. Illinois Board of Law Examiners,* 504 F.2d 474 (7th Circuit 1974) when that court stated, in a case similar to this one:

> "Furthermore, merely seeing his exam or comparing it with others would not allow plaintiff to expose errors or discern his abilities. These procedural rights would be virtually meaningless unless plaintiff also was able to confront the bar examiners and obtain from them explanations of their grades . . . Requiring an explanation for each of these applicants would place an intolerable burden upon the bar examiners. It also would place at an unfair disadvantage those applicants who were taking the exam for the first time." (p. 478)

Finally, the appellant urges that the law was misconstrued by the Court below. He states that there is a "right to travel" problem involved herein. As discussed, above, there is no residency requirement in the State of Washington to be eligible to sit for the bar examination and consequently appellant's "right to travel" argument is groundless. Appellant also argues that *Griggs v. Duke Power Company,* 41 U.S. 424 (1971) is applicable to the case at bar. The Supreme Court concluded on page 776:

> "Finally, *Griggs v. Duke Power Company,* supra, is not relevant since it involved impermissible racial discrimination in employment tests violative of the Civil Rights Act, 42 USCA § 2000 E-2 (1964). Herein, there has not even been an allegation of racial discrimination in the conduct or operative effect of the Washington Bar examination nor is there anything in the record supportive of such a possibility."

The instant case is in no way analogous to *Griggs* and no amount of strained reasoning can make it so. Once again, the appellant's unsupported allegation that the Washington State Bar examination is not a test of his ability to practice law is asserted. Beyond that, appellant does not further his contention. On the other hand, appellee has established that its tests are appropriately administered in order that it may recommend to the Supreme Court, with some assurance, that applicants to the Bar possess the requisite qualifications to advise and represent clients in legal matters.

II.

No Substantial Federal Question Is Presented

Upon analysis, the appellant raises only two arguments in support of his position that a substantial federal question is presented. First, it is contended that the use of a multiple choice bar examination encourages guessing and bares no rational connection to the appellant's ability to practice law. Second, it is contended that the essay portion of the Washington State Bar examination is administered in a manner which is manifestly unfair.

Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 238-239, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957), defines the extent of the federal concern as to the right to be admitted to practice law in a state:

> "A state cannot exclude a person from the practice of law or any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the Fourteenth Amendment.
>
> • • •
>
> "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.
>
> • • •
>
> "Even in applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

A. *The Multi-State Bar Examination Is a Rational Method of Testing Proficiency at the Law*

The use of multi-state bar examination was the result of an exhaustive and searching study of the entire bar examining process, initiated in 1967 by the National Conference of Bar Examiners. A committee was appointed to conduct the study, the members of which included bar examiners, law school deans, law school professors, and professional testing experts.

As a result of their studies, the committee recommended that the National Conference prepare a multi-state bar examination which would be made available to any of the states interested in using the examination. The examination which was developed is a multiple choice test, which consists of 200 questions. The questions consists of a statement of facts, which is not unlike that used in the typical essay question, followed by a number of questions, each of which may be answered by checking one of four answers. The applicant is directed to select the best of the four answers. The questions require a knowledge of the field of law examined in and the ability to analyze the fact situation in light of the legal questions and apply the law accurately, The test requires a high degree of discrimination and informed reasoning.

Justice Frankfurter, in his concurring opinion in *Schware supra*, said on page 248:

> "It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular state for admission to its bar . . . .Especially in this realm it is not our business to substitute our judgment for the state's judgment—for it is the state in all the panoply of its powers that is under review when the action of its Supreme Court is under review."

More recently, the Court of Appeals in *Whitfield, supra*, page 477 said:

> "Admission to practice in a state and before its courts is primarily a matter of state concern. And the determination of which individuals have the requisite knowledge and skill to practice may be properly committed to a body such as the Illinois Board of Law Examiners. *Douglas v. Noble*, 261 U.S. 165, 43 Sup. Ct. 303, 67 L.Ed. 590. A federal court is not justified in interfering with this determination unless there is proof that it was predicated upon a constitutionally impermissible reason. *Schware, supra*, 353 U.S. at 238-240; *id* at 248-249, 77 Sup. Ct. 752 (Frankfurter, J., concurring)."

The error underlying appellant's attack on the multi-state portion of the bar examination is the unfounded con-

clusion that because the applicant is directed to select the best of the four answers, the test is manifestly unfair because the applicant must guess which type of client the exam writer had in mind and rely in great part upon luck. In actuality, the questions are so structured that, although more than one of the four possible solutions may appear to be eligible answers, one of them is determinable, through careful analysis, to be the best answer, and that is the only answer for which an applicant receives credit. This is a reasonable and rational method of testing and does not violate due process.

B. *The Essay Portion of the Washington State Bar Examination Is Not Administered In an Unfair Manner*

In *Whitfield, supra*, on page 477, the Court of Appeals said:

> ". . . [a]s Justice Brandeis observed for a unanimous court in *Douglas v. Noble, supra*, 'It is not to be presumed that powers conferred upon the admission boards. . . . .' 261 U.S. at 170, 43 Sup. Ct. at 305. In this case, plaintiff has merely alleged, in essence, that an essay type examination requires subjective evaluation and that the standards of grading are not susceptible to precise definition. We agree with the Eighth and Ninth Circuits that such an allegation is not sufficient to state a claim for federal relief. *Feldman v. State Board of Law Examiners*, 438 F.2d 699, 705 (8th Circuit 1971); *Chaney v. State Bar of California*, 386 F.2d 962, 964-965 (9th Circuit 1967, sert. denied 390 U.S. 1011, 88 Sup. Ct. 1262, 20 L.Ed.2d 162."

The Washington Supreme Court noted that essay questions carry with them some degree of subjectivity and further noted that circumstances could arise where essay questions or the method of grading them could be arbitrary and capricious. However, the Court held that there

was no evidence in the record indicative of arbitrary or capricious action and held that the general fairness of the bar examination had been sufficiently established. (85 Wn. 2d 774, 778)

Every precaution is made to keep the bar examination utterly fair, impartial, and impersonal. If the bar association is to be charged with responsibility for the conduct and performance of practicing attorneys, it must have adequate control over the admission of these attorneys to the practice of law.

CONCLUSION

Wherefore, appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Washington.

Respectfully submitted,

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